No. 93-180



# In the Supreme Court of the United States

OCTOBER TERM, 1993

BOCA GRANDE CLUB, INC., PETITIONER

*v.*

FLORIDA POWER & LIGHT COMPANY, INC.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*



## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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## QUESTION PRESENTED

Whether, in a tort action under the general maritime law, defendants who do not settle before trial but proceed to trial may seek contribution from defendants who are joint tortfeasors but who settled with the plaintiff prior to trial.

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### INTEREST OF THE UNITED STATES

This case presents an important question of federal admiralty law concerning the proper apportionment of damages in tort cases in which some defendants settle with the plaintiff before trial but other defendants proceed to trial and judgment. Specifically, the question on which the Court granted review in this case is whether the nonsettling defendant may seek contribution from a settling defendant. This case is closely related to *McDermott, Inc.* v. *AmClyde and River Don Castings Ltd.*, No. 92-1479 (set for argument January 11, 1994), because a threshold question in

resolving the problem presented here is whether the liability of the nonsettling defendant to the plaintiff should be reduced by the proportionate share of the total liability owed to the plaintiff (the so-called "pro rata" rule) or instead by the dollar amount of the settlement with the settling defendant (the so-called "pro tanto" rule). We have filed a brief on behalf of the United States as amicus curiae in *McDermott*, arguing that the Court should adopt the pro rata rule. If the Court adopts that rule, then the nonsettling defendant would have no occasion to seek contribution from the settling defendant, and thus the question presented in this case would not need to be addressed.

In addition to the general interest of the United States in the uniquely federal law of admiralty, the United States has a particular interest in the problem at issue here and in *McDermott*, because it frequently is a party to admiralty tort suits, including suits brought against it under the Suits in Admiralty Act, 46 U.S.C. App. 741-752, and the Public Vessels Act, 46 U.S.C. App. 781-790. Indeed, the United States was a party to this Court's leading case in the area, *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975). Moreover, because any of the proposed rules would benefit the United States in some cases and burden it in others, the United States has a uniquely detached interest in the establishment of the most logical and coherent rules for resolution of the problems at issue in this case and in *McDermott*.

## STATEMENT

1. Robert Polackwich, a member of petitioner Boca Grande Club, rented a sailboat from petitioner. On April 23, 1988, Polackwich and his stepson, Jonathan



Richards, were electrocuted while operating the boat, when its mast came into contact with high-voltage power lines owned by respondent. The accident occurred in the navigable waters of the United States. The estates of the deceased individuals brought suit in a Florida state court against petitioner, respondent, and the manufacturer of the boat (O'Day Corporation). Respondent and O'Day in turn brought third-party actions seeking contribution and indemnity from petitioner. See Pet. App. A5, A11; J.A. 6-7.

2. Petitioner then commenced this action in the United States District Court for the Middle District of Florida, seeking to limit its liability to the value of the vessel. J.A. 5-9; see 46 U.S.C. App. 181 *et seq.* Respondent and O'Day filed claims against petitioner for indemnity and contribution in the district court (J.A. 10-15, 16-20), and the estates of the decedents filed claims against petitioner seeking recovery for wrongful death (J.A. 27-31). Subsequently, the estates of the decedents settled their claims against petitioner for $225,000; the district court accordingly dismissed those claims. Pet. App. A11-A13, A24-A26.

Petitioner then filed a motion seeking summary judgment on the claims for indemnity and contribution brought by respondent and O'Day. The district court granted summary judgment in favor of petitioner. Pet. App. A5-A7.[1] The court explained that under "current case law" in the Eleventh Circuit, "a joint tortfeasor is barred from seeking contribution from a settling joint tortfeasor," and "the plaintiff

[1] The district court did not proceed with the claim brought by O'Day because O'Day had entered bankruptcy proceedings. Pet. App. A7.

may recover the full amount of damages, minus the amount received from the settling defendant, from the remaining tortfeasors." *Id.* at A6 (citing *Self* v. *Great Lakes Dredge & Dock Company*, 832 F.2d 1540 (11th Cir. 1987), cert. denied, 486 U.S. 1033 (1988)). The district court declined respondent's suggestion, based on *Miller* v. *Christopher*, 887 F.2d 902 (9th Cir. 1989), and Section 886A of the Restatement (Second) of Torts, to impose a qualification that contribution from a defendant who settled is barred only if the parties settled in good faith. Pet. App. A6.[2]

3. The court of appeals reversed in a brief per curiam opinion. Pet. App. A1-A2. The court explained that its recent decision in *Great Lakes Dredge & Dock Company* v. *Tanker Robert Watt Miller*, 957 F.2d 1575, cert. denied, 113 S. Ct. 484 (1992), had rejected the analysis on which the district court relied and had determined that "under maritime law, a tortfeasor is not precluded from seeking contribution from a joint tortfeasor who has settled." Pet. App. A2. Accordingly, the court of appeals vacated the district court's award of summary judgment and remanded for further proceedings on respondent's claim for contribution. *Ibid.*

## INTRODUCTION AND SUMMARY OF ARGUMENT

1. This case presents an important question of federal maritime law: whether a defendant that does not settle a maritime tort claim before trial, but proceeds to a trial at which a judgment is entered against it, is entitled to seek contribution from other

[2] Respondent conceded that its claim against petitioner for indemnity was barred as a matter of law, Pet. App. A6, and the indemnity claim therefore is not at issue here.



joint tortfeasors that settled with the plaintiff in advance of trial. Before the Court considers that question, it should, in our view, consider an analytically prior question, which is before the Court in *McDermott, Inc.* v. *AmClyde and River Don Castings Ltd.*, No. 92-1479 (set for argument January 11, 1994): whether the total amount of liability found to be owed to the plaintiff should be reduced by the proportionate share of the liability attributable to negligence on the part of the settling defendants (the so-called pro rata approach),[3] or instead should be reduced by the dollar amount of the settlement (the so-called pro tanto approach). If the Court adopts the pro rata approach, then it would be inappropriate to allow the nonsettling defendant to seek contribution from the settling tortfeasor, because the judgment against the nonsettling defendant already would have been reduced to take appropriate account of the settling tortfeasor's share of responsibility for the tort. In our brief in *McDermott* [hereinafter Gov't *McDermott* Br.], we argue that the Court should adopt the pro rata approach.[4] If the Court does not

[3] Amicus National Association of Securities and Commercial Law Attorneys (NASCAT) suggests that the rule we advocate in *McDermott* is more appropriately referred to as a "proportional reduction" rule, and that the term "pro rata" rule should be applied to a system that reduces liability based on the assumption that each defendant bore an equal share of the liability (so that liability would be reduced by one-fourth if one out of four defendants had settled). For consistency, we use the term "pro rata rule" to refer in this brief, as in our brief in *McDermott*, to a system that reduces the nonsettling defendant's liability by the proportionate share of liability attributable to the settling defendants.

[4] We have provided counsel for the parties and the amici with copies of our brief in *McDermott*. The brief on the merits

adopt that approach, however, it should allow the nonsettling tortfeasor to seek contribution from tortfeasors that settled before trial.[5]

2. This case presents a question of general maritime law, as to which no Act of Congress is dispositive.[6] Accordingly, the Court should adhere to its practice of "tak[ing] the lead in formulating flexible and fair remedies in the law maritime," *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). In *Reliable Transfer*, the Court determined that liability in maritime tort cases generally should be determined on the basis of principles of comparative fault. A rule permitting contribution furthers that principle by requiring a joint tortfeasor that settled before trial to contribute to judgments against other tortfeasors, but only if (and to the extent) the settlement did not require the settling tortfeasor to pay a share of the liability that is equivalent to its share of responsibility for the tort.

The principal argument against a rule permitting contribution is that such a rule would unduly discourage settlements, by leaving settling tortfeasors open to the risk of future litigation. That argument, however, ignores the deterrent effect of the costs incurred by the nonsettling tortfeasor in bringing a subsequent action for contribution, as well as the possibility of litigation over whether the parties entered into the settlement in good faith, which would be likely to occur if contribution generally were barred. Moreover, if a plaintiff wishes to secure a settlement from a tortfeasor predicated on the tortfeasor's absolute protection from further liability, the plaintiff can agree to indemnify the tortfeasor from suits for contribution.

As a general matter, any adverse effects that a rule of contribution otherwise might have on settlement would be vitiated if the Court adopts the pro rata rule we urge in *McDermott*. But if the Court adopts the

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of petitioner in this case states that it supports the pro rata rule we urge in *McDermott*, Pet. Br. 5 ("Petitioner submits that the *pro rata* or comparative fault rule is preferable because it extinguishes the proportional share of the liability of the settling defendant and makes contribution unnecessary.").

[5] We stated our position on this contribution issue (without substantial elaboration) in our brief in *McDermott*, in the event the Court were to reject the pro rata rule in that case. Gov't *McDermott* Br. 10 n.3, 16 n.9.

[6] The Court has reached differing results on the propriety of actions for contribution in contexts governed by specific Acts of Congress. Compare, *e.g.*, *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 634-646 (1981) (no right to contribution in action under Section 1 of the Sherman Act, 15 U.S.C. 1), with *Musick, Peeler & Garrett* v. *Employers Insurance*, 113 S. Ct. 2085, 2089-2092 (1993) (right to contribution in implied right of action under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. 240.10b-5, by reference to the express right of contribution under Sections 9(e) and 18(b) of the 1934 Act, 15 U.S.C. 78i(e) and 78r(b)). Where an Act of Congress expressly confers a right of contribution, a further question would be presented in a case such as this—namely, whether the courts would have the authority to bar a nonsettling defendant from invoking that statutory right against a settling defendant based on the courts' own determination that such a bar would encourage settlements. Here, however, the right of contribution itself is not conferred by Act of Congress, but instead has been recognized by the Court in its elaboration of principles of maritime law. The appropriateness of a bar to contribution against a settling defendant therefore is a matter for the Court to consider within the broader framework of comparative fault the Court has articulated in this setting.

pro tanto approach, we believe the paramount interest in fair allocation of liability for maritime torts weighs in favor of a rule of contribution, notwithstanding the adverse effects it might have on settlement.

## ARGUMENT

### IF FEDERAL MARITIME LAW HOLDS A DEFENDANT WHO PROCEEDS TO TRIAL LIABLE FOR THE ENTIRE AMOUNT OF THE JUDGMENT, REDUCED ONLY BY THE DOLLAR AMOUNT OF ANY SETTLEMENTS ENTERED INTO BY JOINT TORTFEASORS, THE NONSETTLING DEFENDANT SHOULD BE PERMITTED TO SEEK CONTRIBUTION FROM SETTLING JOINT TORTFEASORS

As we explain in detail in our brief in *McDermott* (Gov't *McDermott* Br. 11-14), "Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law," *Fitzgerald* v. *United States Lines Co.*, 374 U.S. 16, 20 (1963), and this Court has responded by attempting to "formulat[e] flexible and fair remedies," *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 409 (1975). When the question is one of maritime tort law, the Court has attempted to ascertain the rule that "[u]nder the circumstances [is] most just and equitable, and * * * best tend[s] to induce care and vigilance on both sides, in the navigation." *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170, 177-178 (1855); see *Reliable Transfer*, 421 U.S. at 402-403.[7] In this case,

[7] As we explain in our brief in *McDermott*, the Court has not customarily looked to state law in resolving issues of general maritime law. Gov't *McDermott* Br. 14 n.8. To the extent that the tort law of the States is relevant, however, Section 5 of the 1939 version of the Uniform Contribution Among Tortfeasors Act generally provides that a settlement by one tortfeasor does not protect that tortfeasor from a subsequent action for contribution. 12 Uniform Laws Annotated 58 (1975). That provision (or a substantially similar provision) is codified in at least eight States. See Ark. Code Ann. § 16-61-205 (Michie 1987); Del. Code Ann. tit. 10, § 6304(b) (1975); Haw. Rev. Stat. § 663-15 (1988); Idaho Code § 6-806 (1990); Md. Ann. Code art. 50, § 20 (1991); Pa. Stat. Ann. tit. 42, § 8327 (1982); R.I. Gen. Laws § 10-6-8 (1985); S.D. Codified Laws Ann. § 15-8-18 (1984).

On the other hand, Section 4 of the 1955 version of the Uniform Contribution Among Tortfeasors Act protects a settling tortfeasor from suits for contribution by other tortfeasors, but only if the settlement was entered into in good faith. 12 Uniform Laws Annotated 99 (1975). That provision (or a substantially similar provision) is codified in at least 16 States. Ariz. Rev. Stat. Ann. § 12-2504 (Supp. 1993); Cal. Civ. Proc. Code § 877 (West Supp. 1993); Fla. Stat. Ann. § 768.31(5) (West 1986); 740 Ill. Compiled Stat. § 100/2(c) and (d) (1993); Mass. Ann. Laws ch. 231B, § 4 (Law. Co-op. 1986); Mich. Comp. Laws Ann. § 600.2925d (West 1986); Mo. Ann. Stat. § 537.060 (Vernon 1988); Nev. Rev. Stat. Ann. § 17.245 (Michie 1986); N.H. Rev. Stat. Ann. § 507:7-h (1992); N.C. Gen. Stat. § 1B-4 (1992); N.D. Cent. Code § 32-38-04 (1976); Okla. Stat. Ann. tit. 12, § 832.H (West 1988); Or. Rev. Stat. Ann. § 18.455 (Butterworth 1988); S.C. Code Ann. § 15-38-50 (Law. Co-op. Supp. 1992); Tenn. Code Ann. § 29-11-105 (1980); Va. Code Ann. § 8.01-35.1 (Michie 1992). Texas and Washington have adopted non-uniform provisions that also bar contribution in similar circumstances. Tex. Civ. Prac. & Rem. Code Ann. § 33.015(d) (West Supp. 1993); Wash. Rev. Code Ann. § 4.22.606 (West 1988).



those considerations support a right of contribution against the settling joint tortfeasor if the settlement does not result in a proportionate reduction in the total liability to the plaintiff.

### A. A Rule Permitting A Tortfeasor To Seek Contribution From Joint Tortfeasors That Settled Before Trial Furthers The Interest in Apportioning Liability According To The Comparative Fault Of The Parties

Although common-law courts did not generally require contribution among joint tortfeasors,[8] that rule—if it ever did apply in admiralty—has had at best limited application in that context for more than five centuries.[9] Similarly, this Court early on noted the impropriety of requiring a single party to bear all liability in a collision case involving the mutual fault of both vessels, *Strout* v. *Foster*, 42 U.S. (1 How.) 89, 92 (1843). In 1855, the Court responded to that

[8] *E.g.*, *Merryweather* v. *Nixan*, 101 Eng. Rep. 1337 (K.B. 1799); see *Union Stock Yards Co.* v. *Chicago, B.&Q.R.R.*, 196 U.S. 217, 224 (1905). The English rule against contribution was abolished as a general matter by Section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, 25 & 26 Geo. 5, ch. 30. In maritime cases involving injury to person, contribution was expressly permitted by Section 3 of the British Maritime Conventions Act, 1911, 1 & 2 Geo. 5, ch. 57, in which Great Britain adopted the Brussels Collision Convention of 1910. See Henry V. Brandon, *Apportionment of Liability in British Courts Under the Maritime Conventions Act of 1911*, 51 Tul. L. Rev. 1025, 1028 (1977).

[9] One writer traces the history of contribution in maritime law to the thirteenth century and observes that "there is no reason to suppose it to have been an innovation then." Graydon S. Staring, *Contribution and Division of Damages in Admiralty and Maritime Cases*, 45 Calif. L. Rev. 304, 305-310 (1957); see *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106, 110 (1974) ("In *The North Star*, 106 U.S. 17 (1882), Mr. Justice Bradley traced the doctrine [permitting sharing of damages among the parties in collision cases] back to the Laws of Oléron which date from the 12th century, and its roots no doubt go much deeper.").



concern by holding that where two vessels collide at sea damages should be divided equally between the joint tortfeasors. *The Schooner Catharine* v. *Dickinson*, 58 U.S. (17 How.) 170, 177-178 (1855). The Court soon extended that rule of divided damages to other cases involving property damage, *The Alabama and the Game-cock*, 92 U.S. 695, 696-698 (1876), and then applied it to personal injury cases in *The Max Morris*, 137 U.S. 1, 7-15 (1890). Hence, by the turn of the century Justice Holmes was able to observe that, despite the "rule of the common law * * * that there is no contribution between wrongdoers * * * the admiralty rule in this country is well known to be the other way." *Erie R.R.* v. *Erie & Western Transport Company*, 204 U.S. 220, 225 (1907).

As the Court in this century has attempted to apply modern tort principles in the maritime context, it has increasingly emphasized the principle—which underlies the Court's nineteenth century decisions permitting divided damages—that the exposure of parties that jointly commit a maritime tort should, to the extent feasible, be based on comparative fault. Thus, in *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court reaffirmed the general rule that joint tortfeasors are entitled to contribution, explaining that "a more equal distribution of justice can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." *Id.* at 111 (internal quotation marks omitted).

Finally, in *United States* v. *Reliable Transfer Co.*, 421 U.S. 397 (1975), the Court overruled the venerable rule of equally divided damages articulated in *The Schooner Catharine*. Significantly for present pur-

poses, the Court did not dispense with that rule in favor of a more limited contribution regime similar to the one sought by petitioner—which would protect joint tortfeasors from suits for contribution as a matter of law—but in favor of a more precise rule of comparative negligence, under which each party bears a liability commensurate with its share of responsibility for the injury. The Court characterized the divided-damages rule as "an ancient form of rough justice" that has no place in a modern system of tort compensation, under which each party should "assum[e] a share of the * * * damages in proportion to its share of the blame, [unless] proportionate degrees of fault cannot be measured and determined on a rational basis." 421 U.S. at 403, 405; see *id.* at 407 (stating that the rule of divided damages is "unnecessarily crude and inequitable in a case * * * where an allocation of disparate proportional fault has been made").

The motivating force of the Court's analysis in *Reliable Transfer* was the principle that a tort system should be designed to allocate liability among all parties in accordance with their respective degrees of fault. The failure of the divided-damages rule to comport with that principle was the basis for the Court's decision to overrule *The Schooner Catharine*. In this case, that same principle calls for a rule that permits contribution. Absent contribution, the defendant that proceeds to trial would be liable for the entire amount of the liability not recovered by the plaintiff in settlement with other defendants, even if the nonsettling defendant's "share of the blame,"



*Reliable Transfer*, 421 U.S. at 405, was quite small.[10] That result is just as inequitable as the result rejected in *Reliable Transfer*. See Restatement (Second) of Torts § 886A comment m, at 343 (1977) (contribution bar "can be very unfair to the other tortfeasors"). Accordingly, the Court should adopt a rule of maritime tort law generally permitting a party adjudged liable for a portion of the responsibility for a maritime tort that properly is attributable to a joint tortfeasor to seek contribution from that joint tortfeasor.

### B. A Suit For Contribution Against A Joint Tortfeasor That Settled Before Trial Does Not Improperly Undermine Incentives For Settlement

The only apparent difference between this case and *Cooper Stevedoring* is that the joint tortfeasor against whom contribution is sought in this case entered into a settlement before trial. Petitioner argues (Pet. Br. 18-21) that the interest in encouraging settlement justifies a rule that bars suits for contribution against defendants that settled their dispute with the plaintiff before trial. That argument posits a stark conflict between the interest in encouraging settlement and the interest in apportioning liability in accordance with comparative fault. At

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[10] See *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 260 n.7 (1979) (quoting *The Atlas*, 93 U.S. 302, 315 (1876)) ("Nothing is more clear than the right of the plaintiff, having suffered such a loss, to sue in a common-law action all the wrong-doers, or any one of them, at his election; and it is equally clear, that, if he did not contribute to the disaster, he is entitled to judgment in either case for the full amount of his loss.").

the outset, we note that the posited conflict is largely illusory, because both interests would be furthered by the rule we urge in *McDermott*: under that rule, defendants that settled before trial would be immune from subsequent actions by their joint tortfeasors for contribution, and defendants that proceed to trial would not be required to bear a portion of the liability attributable to the share of fault of those joint tortfeasors that settled before trial. In any event, if the Court rejects our argument in *McDermott*, we nevertheless believe that the interest in encouraging settlement does not justify a bar to contribution among joint tortfeasors in the maritime context, even when one or more of the joint tortfeasors has settled with the plaintiff prior to trial.

First, it seems most unlikely that a general bar to contribution would protect settling joint tortfeasors from all future litigation, because a contribution-bar rule presumably would be qualified by the requirement that the parties settled in good faith. Petitioner opposes even that qualification (Pet. Br. 21-23), but the consequences of such an absolute rule are striking: a collusive agreement between the plaintiff and one tortfeasor (for example, an agreement between a plaintiff and a related party that shared some responsibility for the tort) would leave other tortfeasors exposed to liability for substantially all of the harm caused by the tort. Accordingly, the courts of appeals that have considered the question generally have barred contribution only when the parties entered into the settlement in good faith. *Miller* v. *Christopher*, 887 F.2d 902, 903-908 (9th Cir. 1989); *Rufolo* v. *Midwest Marine Contractors, Inc.*, No. 92-1593 (7th Cir. Sept. 29, 1993), slip op. 6-8; see Restatement (Second) of Torts § 886A comment m, at



343 (1977) (contribution-bar rule without good-faith limitation "provides a clear incentive to collusion between the settling parties").[11] If this Court were to follow that trend and adopt a contribution-bar rule limited to good-faith settlements, then the principal benefit of a contribution-bar rule—firm protection against future litigation—would be substantially vitiated. As the Restatement (Second) of Torts explains, "once there is an attempt to provide objective criteria for determining whether a transaction is in good faith, the finality of the release comes into question, books cannot be closed and the major advantage of the solution is dissipated." § 886A comment m, at 343; see *Rufolo*, slip op. 17 (Eisele, J., concurring) ("A mini-trial concerning the merits of the settlement will usually be required to determine whether the liability assumed by the settling tortfeasor is reasonably related to the strength of the plaintiff's claims."); 2 *Benedict on Admiralty* § 3.c[2], at 1-10 (6th ed. 1993) (litigation over the question of good faith "brings the case back to the courts to determine whether this standard has been met, thereby reducing the benefit of the final disposition of a claim through settlement").[12]

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[11] The States that have enacted a contribution-bar rule by statute generally have done so by enacting the 1955 version of the Uniform Contribution Among Tortfeasors Act, which limits the contribution-bar rule to good-faith settlements. See note 7, *supra*.

[12] The propriety of a good-faith limitation on a contribution-bar rule is not squarely presented by the petition in this case and was not addressed by the court of appeals (which held that contribution generally is permissible). Accordingly, if the Court rejects our submissions in *McDermott* and in this case and adopts a contribution-bar rule—but chooses not to decide in

Second, any adverse effect on a defendant's willingness to settle can be overcome entirely if the plaintiff agrees to hold the defendant harmless from subsequent actions for contribution. Such an agreement would ensure that the defendant's liability was finally determined at the time of the settlement.[13] Nor is it unfair to expect a plaintiff to agree to such a term. A plaintiff could not have a substantial objection to such a term unless two conditions were true: (1) the plaintiff believes that there is a substantial likelihood that an ensuing trial would demonstrate that the settling defendant paid less than its proportionate share of the harm caused by the tort, and (2) the plaintiff believes that one of the tortfeasors (rather than the plaintiff) should bear the risk of that likelihood. But neither of the plaintiff's options under the latter condition deserves protection in this context. A plaintiff's desire that the settling defendant bear the risk that the plaintiff settled for too little is inconsistent with the plaintiff's willingness to accept the amount offered by the defendant as a definitive resolution of its liability; we see little value in encouraging such settlements. And the plaintiff's alternative desire—that the nonsettling tortfeasors bear that risk, and thus, ultimately, bear a share of liability beyond their share of the fault—is

the first instance whether the contribution-bar rule should be limited to good-faith settlements—it would be appropriate for the Court to remand the case to the court of appeals to permit that court to consider the propriety of a good-faith limitation in the first instance.

[13] In the alternative, the plaintiff could enter into an agreement limiting its right of recovery against the nonsettling defendants to their proportionate share of the liability.



inconsistent with the comparative fault principles this Court articulated in *Reliable Transfer*. Moreover, because the disproportionate allocation of responsibility is entirely within the control of the plaintiff, it falls afoul of the principles set out in *Cooper Stevedoring*, where the Court decried a system that "permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame." 417 U.S. at 111.

In any event, whatever effect permitting contribution against a settling tortfeasor might have on the incentives favoring pretrial settlement, we submit that the paramount interest in requiring tortfeasors to be responsible for their share of liability—and only for their share of liability—requires suits for contribution in these circumstances. The respondent in *Reliable Transfer* argued that a proportional fault rule would discourage settlements. Although the Court was not persuaded that the rule it adopted in fact would have that effect (421 U.S. at 407-408), the Court went on to observe that the argument, even if true,

> could hardly be accepted. For, at bottom, it asks us to continue the operation of an archaic rule because its facile application out of court yields quick, though inequitable, settlements, and relieves the courts of some litigation. Congestion in the courts cannot justify a legal rule that produces unjust results in litigation simply to encourage speedy out-of-court accommodations.

*Id.* at 408. The same concern applies here.

## CONCLUSION

If the Court does not apply to this case a rule requiring that the liability of a nonsettling defendant be reduced by the proportionate share of the liability attributable to a settling defendant, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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